Supreme Court, U. S.
FILED
MAR 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

71-5251

DAVID ALLEN LUSBY,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Robert C. Whitestone
Assistant Commonwealth's Attorney
Fairfax County, Virginia
4000 Chain Bridge Road
Fairfax, Virginia 22030

Attorney for Respondent

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Statute Involved	2
Statement of Case	2
Question Presented for Review	3
Argument	3
Conclusion	7

TABLE OF CITATIONS

C A S E S

PAGE

Adderly vs. Florida, 385 U.S. 39, 17 L Ed 2d 149, 87 S Ct 242 (1966).....4

Amalgamated Food Employees v. Logan Valley Plaza, 391 US 308, 20 L Ed 2d 603, 88 S Ct 1601 (1968).....4

Cameron v. Johnson, 390 US 611, 616, 20 L Ed 2d 182, 187, 88 S Ct 1335.....4

Cox v Louisiana, 379 US 559, 13 L Ed 2d 487, 85 S Ct 476 (1965), 391 US at p 320, 20 L Ed 2d at p. 613.....4

Johnson v. Commonwealth of Virginia, Record No. 7749 _____Va _____(January 17, 1972).....3

OTHER AUTHORITIES

Virginia Code Section 18.1-173..... 2

28 U.S.C. Section 1257(3)..... 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

DAVID ALLEN LUSBY,

Petitioner,

-v-

COMMONWEALTH OF VIRGINIA,

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

On October 7, 1970, the Petitioner was convicted in the Circuit Court of Fairfax County, Virginia, of trespassing, in violation of Virginia Code Section 18.1-173, and was fined One Hundred Dollars ($100.00). Thereafter, the Supreme Court of Appeals denied Petitioner's Writ of Error and upheld his conviction.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. Section 1257(3).

STATUTE INVOLVED

Virginia Code Section 18.1-173 provides in pertinent part as follows:

> Section 18.1-173. Trespass after having been forbidden to do so. If any person shall without authority of law go upon or remain upon the lands, buildings or premises of another, or any part, portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof, or after having been forbidden to do so by a sign or signs posted on such lands, buildings, premises or part, portion or area thereof at a place or places where it or they may be reasonably seen, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars or by confinement in jail not exceeding twelve months, or by both such fine and imprisonment.

STATEMENT OF THE CASE

On December 22, 1969, the Petitioner was arrested for trespassing in the offices of Selective Service Local Board Number 39 in Fairfax City, Virginia (T. 15, 55). The time that the Petitioner selected to linger in Fairfax City's Selective Service Board Office and pass out anti-war literature was one of the busiest of the year for the office (T. 61, 118). The Petitioner was not there to ask for any draft related information from anyone (T. 20). To further complicate matters the reception area measured approxi-

mately ten feet by twenty feet (T. 20). Petitioner remained in the reception area for approximately three hours prior to the final request to leave, and thereafter stated that he knew the Complainant's position but for her to go right ahead and get the trespassing warrant (T. 23). The interference by Petitioner was substantial in that it caused considerable lost time for the employees working in Local Board Number 39 (T 23, 24, 33, 34, 40, 41). On one occasion, the entranceway to Board Number 39's office was congested by the presence of the demonstrators (T 47, 48) and the congestion restricted the ingress and egress of bona fide personnel.

QUESTION PRESENTED FOR REVIEW

Whether the First Amendment of the United States Constitution permits conduct proscribed by Virginia Code Section 18.1-173.

ARGUMENT

Virginia Code Section 18.1-173 makes it a misdemeanor for any person to remain upon the premises of another without authority after having been prohibited from doing so by the person lawfully in charge thereof.

It is clear that the Virginia Code Section 18.1-173 is applicable to public property as well as private property. Johnson v. Commonwealth of Virginia, Record No. 7749, ___ Va. ___ (January 17, 1972).

The question is then presented whether Petitioner's conduct is protected by the First Amendment of the Federal Constitution. If not, his conviction in the case at bar was justified and should be affirmed. Respondent submits that the principles controlling this issue were set forth in the case of Amalgamated Food Employees v. Logan Valley Plaza, 391 US 308, 20 L Ed 2d 603, 88 S Ct 1601 (1968) wherein the Court stated as follows:

> "Where municipal or state property is open to the public generally, the exercise of First Amendment rights may be regulated so as to prevent interference with the use to which the property is ordinarily put by the State. Thus we have upheld a statute prohibiting picketing "in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any . . . county . . . courthouses." Cameron v. Johnson, 390 US 611, 616, 20 L Ed 2d 182, 187, 88 S Ct 1335. Likewise it has been indicated that persons could be constitutionally prohibited from picketing "in or near" a court "with the intent of interfering with, obstructing, or impeding the administration of justice." Cox v Louisiana, 379 US 559, 13 L Ed 2d 487, 85 S Ct 476 (1965), 391 US at p 320, 20 L Ed 2d at p. 613.

Additionally, in Adderly vs. Florida, 385 U.S. 39, 17 L Ed 2d 149, 87 S Ct 242 (1966), the Petitioner and others entered a jail grounds through a driveway used only for jail purposes without warning to or permission from the sheriff. The demonstrators refused to move from the property upon request and were arrested for and convicted of trespassing. The Court, affirming their convictions, stated as follows:

> "The State, no less than a private owner of property, has power to preserve the property under

> its control for the use to which it is lawfully dedicated. For this reason there is nomerit to petitioner's argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this "area chosen for the peaceful civil rights demonstration was not only 'reasonable' but also particularly appropriate. . . . Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthright rejected in two of the cases petitioners rely on [citing cases]. We reject it again. The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose." 385 US at p.47, 17 L Ed 2d at p. 156.

In the instant case, the time that the defendant selected to linger in Fairfax City's Selective Service Board Office and pass out anti-war literature was one of the busiest of the year for the office. The defendant was not there to ask for any draft related information from anyone. To further complicate matters, the reception area measured approximately ten feet by twenty feet. Defendant remained in the reception area for approximately three hours prior to the final request to leave, and thereafter stated that he knew the complainant's position but for her to go right ahead and get the trespassing warrant. The interference by Defendant was substantial in that it caused considerable lost time for the employees working in Local Board Number 39. On one occasion, the entranceway to Board Number 39's office was congested by the presence of the demonstrators and the congestion restricted the ingress and egress of bona fide personnel.

In the case at bar, the trial court found that the

Petitioner's conduct interfered with the primary use of the offices of Selective Service Local Board Number 39 in Fairfax City, Virginia. It is clear that the acting draft board's supervisor had both the right and the obligation to prevent interference with the operation of the business of the board by ejecting the Petitioner. His refusal to leave plainly constituted a violation of Virginia Code Section 18.1-173. Therefore, your Respondent respectfully submits that Petitioner's conviction should be affirmed.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

Robert C. Whitestone
Assistant Commonwealth's Attorney
Fairfax County, Virginia
4000 Chain Bridge Road
Fairfax, Virginia 22030

Attorney for Respondent